

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA

IN CHAMBERS ( ) IN OPEN COURT ( x )

SPECIAL MASTER SUSAN WARD HARRIS  
Presiding

IN RE THE GENERAL ADJUDICATION  
OF ALL RIGHTS TO USE WATER IN THE  
GILA RIVER SYSTEM AND SOURCE

CIVIL NO. W1-11-605

ORDER MODIFYING  
PROTECTIVE ORDER;  
GRANTING MOTION TO  
COMPEL IN PART AND  
DENYING IN PART; AND  
ORDERING *IN CAMERA* REVIEW

CONTESTED CASE NAME: *In re Fort Huachuca.*

HSR: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: The Special Master grants the Motion to Modify the Protective Order, dated November 8, 2012, grants the Motion to Compel in part and denies in part and orders *in camera* review of designated documents.

NUMBER OF PAGES: 4.

DATE OF FILING: March 10, 2016.

On February 12, 2016, Freeport Minerals Corporation filed a motion to compel production of documents from the United States and a motion to dissolve the Protective Order, dated November 8, 2012, ("Protective Order") to obtain a series of documents containing communications concerning a Programmatic Biological Assessment prepared by the United States Army. The United States, in its response, asserted attorney client privilege, work product protection, lack of relevance and the existing Protective Order.

Oral argument was heard on March 8, 2016.

The Protective Order limited discovery of documents and information concerning the Programmatic Biological Assessment (PBA) based on the absence of relevance under Arizona Rules of Civil Procedure 26(b)(1)(A). Freeport Minerals Corporation claims that the positions of the parties in this case have changed thereby requiring the dissolution or modification of the Protective Order. The issues designated for this case in 2012 are identical to the issues that will be tried in eight months, *to wit*:

1. What is the scope of water uses encompassed by the term “military purposes”?
2. What is the quantity of water reserved to fulfill the military purposes?
3. Are sources of water other than groundwater adequate to accomplish the military purposes, and if not, what is the quantity of groundwater required to accomplish those purposes?

The record does not support the assertion that the issue of “military purposes” has changed from water uses on Fort Huachuca to water uses on and off of Fort Huachuca. *See* Order Granting the Special Master’s Motion for Adoption of the April 4, 2008 Report Regarding Fort Huachuca, filed September 7, 2011 (contemplates that water use outside of the boundaries of Fort Huachuca may constitute a military purpose). Similarly, the issues have not been expanded to include consideration of the federal reserved water rights for the San Pedro National Riparian Area, which pursuant to Freeport Minerals Corporation’s Motion for Status Conference Concerning Procedures for Resolving Dispositive Motions and Trial Work in Contested Cases in this Adjudication, filed October 19, 2015, and the agreement of all parties, was continued until 2017. Accordingly, production of documents concerning groundwater modeling to assess or groundwater mitigation efforts to ameliorate the impact of groundwater pumping by Fort Huachuca on the aquifer, the riparian habitat or the San Pedro River continue to be barred by the Protective Order. The Motion to Compel is denied with respect to the production of those documents.

The critical relevant change that has occurred since 2012 is the United States’ designation of Mr. Joel Degner and Dr. Donald Stedelman as its experts to testify about:

1. the surface water available for use on Fort Huachuca for military purposes,

- including the location, capacity and reliability of the surface water resources;
2. the per capita amount of water used both on and off the Fort Huachuca necessary to carry out the military purposes of Fort Huachuca; and
  3. the demographics and population of Ft. Huachuca.

No reason exists at this point to reach the question of whether either the attorney client privilege or work product protection initially applied to the communications with Mr. Degner or Dr. Stadelman at the time of the development of the PBA because the United States states that the privileges are waived as to those communications relating to the respective expert testimony. United States' Opposition, p. 1. *See, e.g., Para v. Anderson ex rel. County of Maricopa*, 231 Ariz. 91, 93, 290 P.3d 1214, 1216 (App. 2012) ("A party that elects to present its consulting expert as a testifying witness waives the privileges and discovery protections that would otherwise apply to the expert.") Freeport Minerals Corporation does not purport to seek documents that exceed the standard asserted by the United States. It argues that the documents it seeks "clearly relate to the subject matter" of the expert testimony. Freeport Minerals Corporation's Motion to Compel, p. 1. Thus, the only issue is whether the requested documents do clearly relate to the expert testimony.

Mr. Degner's testimony concerning water use by Fort Huachuca relies upon a groundwater demand accounting methodology that was developed in part during the preparation of the PBA. Fort Huachuca Water Resources Report, dated May 2015, p. 10, prepared by Joel Degner, P.E., attached as Exhibit E to Freeport Minerals Corporation's Motion to Compel. Accordingly, Freeport Minerals Corporation is entitled to the production of documents involving the PBA that concern the groundwater demand accounting and the development of that methodology. Mr. Degner also based his expert opinion on the availability of surface water in Garden Canyon on the legal restrictions imposed by the Biological Opinion that is based on the PBA. *Id. at p. 8*. Consequently, Freeport Minerals Corporation is entitled to the production of documents involving the PBA that concern the restrictions imposed on the use of water in Garden Canyon due to special conservation measures for the Huachuca water umbel and Mexican spotted owl.

Dr. Selenger's report relies upon and incorporates population surveys done in conjunction with the PBA. Demographic Analysis of the Fort Huachuca, Az Population,

May 2015, by Donald Stadelman, Ph. D., p. 1, attached as Exhibit I to Freeport Minerals Corporation's Motion to Compel. Dr. Selenger also attached an Impact Analysis for Planning Economic Impact Report (IMPLAN) to his Demographic Analysis that appears to have been prepared in conjunction with the PBA. Thus, Freeport Minerals Corporation is entitled to the production of documents with respect to the PBA that concern demographic analysis, population surveys, the IMPLAN and the methodologies employed for those reports.

**IT IS ORDERED** that the Protective Order, dated November 8, 2012, shall be modified to permit discovery of documents involving the designated experts, Mr. Joel Degner and Dr. Donald Stedelman, regarding the Programmatic Biological Assessment that directly relates to their expert testimony in this case.

**IT IS FURTHER ORDERED** granting in part and denying in part the Motion to Compel as set forth above. The United States shall produce the documents for which the Motion to Compel is granted to Freeport Minerals Corporation by March 16, 2016.

**IT IS FUTURE ORDERED** that by March 16, 2016, the United States shall either deliver the documents identified by their respective Privilege Log number below to Freeport Minerals Corporation or to the Court for *in camera* review:

Privilege Log Document Nos. 131, 133-136, 138-141, 143-144, 150, 158, 165, 167, 174, 181, 182, 201, 202, 219, 247, 454, 610, 616, 649, 650, 652, 654, 838, 839, 863 and 864.

DATED: March 10, 2016



SUSAN WARD HARRIS

Special Master

On March 10, 2016, the original of the foregoing was delivered to the Clerk of the Maricopa County Superior Court for filing and distributing a copy to all persons listed on the Court approved mailing list for Contested Case No. W1-11-605.